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Issue Date: 26 November 2003

CASE NO.: 2003-LHC-1018

OWCP NO.: 7-163264

IN THE MATTER OF

LARRY K. LEE
Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS, INC/ AVONDALE
Employer

APPEARANCES:

Ed W. Bankston, Esq.
For Claimant

Aldric Poirier, Jr., Esq.
For Employer/Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by Larry K. Lee (Claimant) against Northrop Grumman Ship Systems, Inc./Avondale (Employer). The formal hearing was conducted in Metairie, Louisiana on September 10, 2003. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written

arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibit 1, and Employer's Exhibits 1-6. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on January, 24, 2002;
2. An employer/employee relationship existed at the time of the injury/accident;
3. Employer was advised of the injury/accident on January, 25, 2002;
4. A Notice of Controversion was filed March 20, 2002;
5. An informal conference was held on October 24, 2002;
6. The average weekly wage at the time of injury is disputed;
7. Temporary total disability and temporary partial disability is disputed;
8. Employer paid no disability compensation;
9. Medical benefits have not been paid; and
10. Date of maximum medical improvement is disputed.

Issues

The unresolved issues in this proceeding are:

1. Causation;
2. Average Weekly Wage;
3. Nature and Extent of Disability;
4. Maximum Medical Improvement; and
5. Medical benefits.

[1]The parties were granted time post hearing to file briefs. This time was extended up to and through October 10, 2003.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "TR __"; Joint Exhibit- "JX __, p.__"; Employer's Exhibit- "EX __, p.__"; and Claimant's Exhibit- "CX __, p.__".

Statement of the Evidence
Testimonial and Non-Medical Evidence

Claimant worked as a shipfitter for Employer, using welding equipment to tack weld, thereby enabling welders to permanently weld the vessel structures. At the time of the formal hearing, Claimant was 47 years old, and had lived in New Orleans, Louisiana for over forty years.

On January 24, 2002, Claimant was putting collar plates on a unit, which required him to use a ladder and a "come-along" to pull the plates into place so they could be measured and tacked off. Initially, he had been assigned a helper, however, after 2 hours the helper was reassigned to another work area. In order to work alone, Claimant had the welding lead over his shoulder while standing on the top of the ladder. As he was ratcheting the come-along, the ladder shifted when the leg fell into a port hole and Claimant was left dangling from a beam by his five point safety harness. Claimant was able to reach his right leg to a hole in the structure and pull himself over to an opening. He unhooked his belt, and climbed through the hole down to the floor (TR 26). Claimant explained that he was emotionally shaken, and immediately left work.

The next morning, January 25, 2002, he felt pain, and could barely walk. Claimant explained that he felt like he had been riding a horse for the first time. He reported to work, and explained to his foreman that he was experiencing pain. His foreman told him to report to the First Aid department. The first report of Claimant's injury was dated January 25, 2002; however, it identified the groin injury having taken place that morning instead of the previous afternoon (EX 2, p. 73). He was taken from First Aid to West Jefferson Medical Center, where he was drug tested and then treated for his injury (TR 29). Claimant testified that he told the doctor that he was hurting in his leg and in his groin. Claimant was initially diagnosed with kidney stones and he was prescribed Capri and sent for a CT scan (EX 2, p. 75-76)

Claimant was unsatisfied with the diagnosis from West Jefferson and reported to his primary care physician, Dr. Leslie Blake, on January 28, 2002. Dr. Blake examined Claimant and ordered further diagnostic tests. She eventually ruled out kidney stones as the source of Claimant's pain, but was unable to determine definitively the etiology of Claimant's groin pain.

Claimant did not return to work following his January 28, 2002, appointment with Dr. Blake. In March 2002 Claimant explained that he was released to light

duty work, but Employer claimed there were no such jobs available (TR 33). He had been restricted from both climbing and lifting. In June 2002, Claimant had been returned to work, and had informed Dr. Blake that he felt ready to return to work. Claimant testified that when he returned to work in June 2002, he was in pain, and after informing his supervisor of the problem, he was told to report to First Aid, who then told him to return to his doctor (TR 36-37). Claimant further explained that he was terminated for failing to provide a medical excuse for the days that he had been absent (TR 63-64). In Claimant's employee records, there is an explanation by Employer stating that Claimant did not provide medical excuses for time absent (EX 2, p. 46), and he was formally terminated on August 12, 2002.

Keith Folse also testified at the formal hearing. Mr. Folse had worked for Employer for 15 years, and had been the supervisor for shipfitters and tackers. When asked about Claimant's reputation as a worker, Mr. Folse explained that Claimant missed a lot of work, and was often complaining of a problem, and he described Claimant as a below average worker (TR 68, 75). Mr. Folse explained that there is always work available for shipfitters (TR 69). Mr. Folse also remembered that in June 2002, Claimant returned to work, but was in pain and left (TR 71).

Medical Evidence

Dr. Leslie Blake, board certified in internal medicine, has been Claimant's primary care physician since December 2001. Initially, Claimant saw Dr. Blake for problems associated with high blood pressure. However, on January 28, 2002 Claimant reported to Dr. Blake's office complaining of back and groin pain. Dr. Blake recorded that Claimant had visited the emergency room at West Jefferson hospital, and was found to have a kidney stone; however, she added that she did not have the accompanying x-ray report. Dr. Blake noted that Claimant's symptoms had improved slightly, but he was still experiencing a lot of groin pain (EX 5, p. 81). After noting the groin pain was of unclear etiology, Dr. Blake suggested further diagnostic tests for kidney stones.

Dr. Harold Fuselier, Jr., an urologist, saw Claimant on January 30, 2002, and noted in his history that Claimant had experienced groin pain after straining at work, and the pain extended down into Claimant's knee (EX 5, p. 85). It was Dr. Fuselier's impression that Claimant suffered from muscle pain, and that there was no evidence of kidney stones (EX 5, p. 86).

Claimant returned to Dr. Blake on February 5, 2002. Claimant continued to complain of groin pain, and related to Dr. Blake the events of January 24, 2002. Dr. Blake explained that after several diagnostic tests there was no evidence that Claimant suffered from kidney stones. Although there were no obvious signs of a hernia, Claimant's symptoms were suggestive of one. The right groin pain became more severe upon lifting heavy objects, and would radiate into the right testicle. Claimant noted that he experienced similar symptoms in January in connection with a respiratory infection; however, the pain in February was significantly aggravated since his January 24, 2002, injury. Claimant was eager to find the source of his pain, and therefore, Dr. Blake ordered a CT scan of the abdomen and pelvis, and arranged a second opinion with a general surgeon. Dr. Blake suggested Claimant avoid heavy lifting and straining (EX 5, p. 88).

On February 6, 2002, Claimant saw Dr. John C. Bowen, III, a general surgeon, for a second opinion. Claimant explained to Dr. Bowen that the complaints of groin pain had onset with his safety harness incident of January 24, 202 (EX 5, p. 92). After a physical examination, Dr. Bowen noted that he found no evidence of a hernia and felt there might be an inguinal strain (EX 5, p. 95). On re-examination, Dr. Bowen noted that Claimant's pain radiates down his right leg, which was inconsistent with a hernia (EX 5, p. 96).

Claimant returned to Dr. Blake on March 7, 2002, with continued complaints of groin pain which extended into his right side. However, Claimant explained that the pain had gotten a little bit better, and Dr. Blake opined that the injury was a groin pull (EX 5, p. 99). Dr. Blake noted that in addition to the groin pain, Claimant had an abnormal chest x-ray. Claimant requested an orthopedic evaluation and physical therapy and Dr. Blake stated that it would be arranged (EX 5, p. 100).

On March 25, 2002, Dr. Blake authored an internal medicine progress note. She stated she spoke with Claimant to fill out forms for disability. Claimant felt he was still unable to return to work, but Dr. Blake was uncertain what further could be done for him. She had made physical therapy and orthopedic appointments because of his persistent groin pain. Dr. Blake wanted him to have an occupational medicine consult with special attention to his job duties because Claimant felt he may fall if he returned to work with his leg pain. Dr. Blake stated that there was no weakness or neurological abnormalities, but the pain was persistent (EX 5, p. 101). Dr. Blake further noted in her deposition (EX 1), that she could not objectively find findings to describe Claimant's disability, but since he felt unable to return to work she did not feel comfortable insisting on his return under those

circumstances. However, from a medical standpoint she felt physiologically he was capable of working (EX 1, p. 17)

On May 5, 2002 Claimant returned to Dr. Blake for a follow up of his various medical problems. She noted that Claimant was starting to feel better. Claimant saw the physical therapist and as a result experienced some pain, but he felt as if he was moving in the right direction. Dr. Blake offered Claimant the option of seeing an orthopedist, but Claimant declined stating that he was doing better at that time (EX 5, p. 104). Dr. Blake recommended Claimant continue with his physical therapy, as it seemed to be alleviating the pain. She felt Claimant's condition was stable, and required less frequent follow-up appointments.

On May 31, 2002, Claimant returned to see Dr. Blake complaining primarily of pulmonary problems. Dr. Blake specifically noted that Claimant felt ready to return to work (EX 5, p. 108). Dr. Blake testified that at that point she felt his groin injury had resolved (EX 5, p. 109, EX 1, p. 23). There were no complaints of groin pain during this visit, and no reason he could not return to his former employment (EX 1, p. 23).

On June 17, 2002, Claimant returned to Dr. Blake with complaints of a cough and phlegm production. He had lost the note allowing his to return to work, and Dr. Blake noted that he was stable enough to return to work (EX 5, p.111). There were no complaints of back or groin pain (EX 1, p. 24). Following this visit, Claimant saw Dr. Blake on four different occasions for non-groin related problems.

On August 5, 2002, Claimant returned to Dr. Blake and complained, amongst other things, of right leg numbness, which he described as sometimes feeling like his leg would give way (EX 5, p. 118). Dr. Blake recorded that it had occurred when he was a pall bearer for a funeral. She noted that Claimant did not have continued weakness, but had numbness from time to time and occasionally experienced back pain that shot down into his right leg. During the physical examination, Dr. Blake noted that the strength in both legs was normal, and that the leg numbness seemed to be subjective. Dr. Blake planned to have an EMG/SVC of the right leg, and Claimant requested a neurological consult. Dr. Blake also suggested back x-rays.

Claimant had the nerve conduction study and a neurological consult as well as a back x-ray (EX 1, p. 25). The result of the nerve conduction study was listed as negative by the neurologist, in other words there was no indication of a nerve problem. The back x-ray showed osteophytosis, or spurs, in the back at several

levels, as well as some degenerative changes. Dr. Leslie Mosher, an orthopedist, also saw Claimant and wrote a report dated August 28, 2002. After a physical examination and review of the diagnostic findings, Dr. Mosher recommended an MRI for further study of the L5-S1 area and any other possible problems with a disc in the lumbar spine. Claimant was expected to follow-up with Dr. Mosher when the imaging was complete (EX 5, p. 125).

On October 29, 2002, Claimant visited Dr. Blake complaining of a sore throat. Dr. Blake diagnosed pharyngitis and prescribed medication (EX 5, p. 130). There were no other complaints of pain. Dr. Blake testified that any disability Claimant experienced on October 29, 2002 was not related to his groin injury (EX 1, p. 29). Dr. Blake also opined, that medically more probably than not, Claimant's complaints of leg weakness were not related to the January 24, 2002 incident (EX 1, p. 30). She felt that Claimant was 100% better by May 2002 when he stated that he was ready to return to work. She felt this was supported by the fact that he made no related complaints throughout the remainder of the May 2002 visits (EX 1, p. 32).

Dr. Blake opined that it could have been some continuing injury that may have resulted in leg numbness, leg weakness, or back pain and Claimant's continuing complaint of groin pain. However, she also expressed her opinion that the leg pain and back complaints which had arisen in August were new problems, and she was hesitant to state that they were related to the January 2002 injury (EX 1, p. 35-36). Dr. Blake finally stated that although anything is possible, the leg problems and the groin strain seemed like two different problems (EX 1, p. 37). Dr. Blake also expressed the opinion that it was possible Claimant was magnifying his symptoms, because the amount of symptoms described seemed out of proportion to what she could find on the exam (EX 1, p. 40).

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc.*, 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the

evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on January 24, 2002. However, Employer did not stipulate that the accident was the cause of Claimant's current complaints. Instead, Employer argues that Claimant's symptoms predate the January 24, 2002 accident and therefore, are not related. Claimant, on the other hand, argues that he sustained both a groin injury and a related back injury when he was suspended in his safety harness, and that the one injury resulted in a variety of symptoms over time.

Dr. Blake's opinion is the only medical opinion contained in the evidence regarding Claimant's injuries. It was her opinion that the groin injury and the leg and back injuries were separate entities, and therefore, for the purposes of analyzing the issue of causation they will be treated separately (EX 1, p. 35).

Claimant invoked the presumption that his groin injury was causally related to the work place event of January 24, 2002. Although Employer seems to argue that no event took place, I disagree. I make this finding based on Claimant's

testimony and the fact that he reported the event the following day and continued consistently to report an event at work. This provides substantial proof that there were conditions at work which could have caused his injury. In addition, the medical providers agreed that Claimant had a groin injury, and therefore, in spite of their failure to definitively diagnose a specific injury, I find that Dr. Blake's records provide evidence that Claimant suffered from an injury. Therefore, the §20(a) presumption serves to link the groin muscle strain identified by Drs. Blake and Bowen with the work related accident described by Claimant.

Employer argues either that the work event did not occur, or that Claimant was not injured. I disagree with Employer that accounts of the event differ "dramatically" and instead find that Claimant was overwhelmingly consistent in his recitation of the events and the description of the resulting pain in his groin. The evidence Employer presents does not rise to the level of "substantial evidence" and is indeed less than a modicum of proof that Claimant did not injure his groin muscle while at work. I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist. Claimant clearly injured his groin while hanging in his safety harness.

Claimant also argues that he injured his back and leg during the same January 24, 2002, incident. As to these injuries, while I find there is sufficient evidence to invoke the presumption of causation regarding Claimant's leg and back complaints, I find the presumption rebutted with substantial evidence, and in weighing all the evidence I find that Claimant's back and leg complaints are not causally connected to the January 24, 2002, work accident.

Claimant described at the formal hearing, as well as to medical professionals, that he had leg and back pain shortly after the accident on January 24, 2002. Dr. Blake noted in her January 28, 2002, medical notes that Claimant had been seen for "back pain" at West Jefferson Medical Center (EX 5, p. 81). And in March 2002, Claimant expressed concerns that if he returned to work he may fall due to his "leg pain." In August 2002, Dr. Blake recorded Claimant's complaints of leg pain which radiate through his back, but attributed it to Claimant's participation in a funeral as a pall bearer (EX 5, p.118). When asked during her deposition if a continuing injury may have resulted in the symptoms of leg weakness or back pain, Dr. Blake replied that she was uncertain but it could be related to the injury (EX 1, p. 36). Claimant's complaints of pain and Dr. Blake's opinion that it may be a continuing injury are sufficient to invoke the presumption of causation, namely that Claimant suffered an injury and work conditions may have existed to cause the harm.

Employer, however, offers substantial evidence to rebut the causation, and in weighing the evidence I find that such evidence is significantly weightier than that presented by Claimant. Although Claimant argues that he reported his back and leg pain shortly after the incident, Dr. Blake's records show that Claimant primarily complained of groin pain, and it was not until August 2002, following the funeral at which he was a pall bearer, that Claimant began to have leg and back pain as his *primary* complaint. At that point, his groin pain had been resolved, and Dr. Blake, although at times equivocal, did say that the August 2002 complaints would not be related to the January 2002 event (EX 1, p. 30). Furthermore, Dr. Bake expressed the opinion that Claimant's complaints seemed out of proportion to what could be found objectively on a physical exam or diagnostic test, thereby implying that Claimant may have been magnifying his symptoms (EX 1, p. 40). When asked if the leg and back pain was a continuation of the groin injury, Dr. Blake replied that she felt it was something "entirely different" (EX 1, p. 25). Although there is fleeting mention of pain in Claimant's leg and back from a variety of medical notes prior to August 2002, I find that those complaints were vague, and neither the focus of Dr. Blake nor even Claimant himself.

In sum, I find that there was substantial evidence to rebut the presumption of causation as to Claimant' back and leg symptoms, and therefore, based primarily on the opinion of Dr. Blake, as well as the chronology of symptom reporting, I find that Claimant's back and leg pain is not related to the January 24, 2002 incident. Claimant may have suffered a back injury, as indicated by Dr. Mosher's records; however, there is insufficient evidence to prove that it was related to the January 24, 2002 event at work. However, his groin pain is related, as discussed above, and the extent, duration and disabling effects of that injury, are in issue.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding &*

Mach. Co., 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 27 BRBS 192 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

Claimant argues that he has not reached maximum medical improvement, and Employer argues instead that Claimant reached maximum medical improvement as of May 31, 2002. The only injury at issue is Claimant's groin injury, and therefore, based on the medical records, and Dr. Blake's deposition testimony, I agree with Employer. Claimant reached MMI for his groin injury on May 31, 2002.

On May 31, 2002, Dr. Blake noted in her records that Claimant's groin pull was "resolved," and at the following appointments Claimant made no complaints of groin pain. Furthermore, Dr. Blake testified in her deposition that there was no reason following May 31, 2002, that Claimant could not return to his former employment (EX 1, p, 23). Therefore, I find that Claimant's condition had reached maximum medical improvement by May 31, 2002.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

Following his injury, Claimant was removed from work until he could be completely evaluated for his condition. Dr. Blake's notes confirm that she wished

for Claimant to remain off of work until he could have an orthopedic evaluation. Therefore, I find Claimant was unable to return to his former employment from January 25, 2002, until the date of Maximum Medical Improvement, May 31, 2002.[3] Throughout that time Claimant was totally temporarily disabled, and Employer has not presented evidence to dispute this finding.

However, beginning May 31, 2002, Dr. Blake felt Claimant was capable of returning to work, based solely on his groin injury, without considering the later unrelated back and leg pain. Therefore, although Claimant's unrelated condition may not have reached MMI, his work related groin strain did reach MMI, with no indication of a residual disability or any medical opinion that the groin injury would in any way prevent him from returning to his former employment as a pipefitter. Therefore, I find that Claimant was able to return to his former employment, and suffered from no residual disability after May 31, 2002. In addition, according to both the testimony of Claimant and Mr. Folse, Employer continued to have work available for shipfitters. Consequently, Claimant would have been able to return to his same wage earning position, and would have suffered no economic disability after reaching MMI on May 31, 2002.

In sum, I find that Claimant was totally temporarily disabled from January 25, 2002, until May 31, 2002, with no residual disability following that date.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.,* 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.,* 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.,* 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'd* 12 BRBS 65 (1980).

[3] Claimant's return to light duty employment in March 2002, was not argued by either party as significant, and although there was some discussion of the availability of light duty employment, Employer did not provide sufficient evidence that such work was in fact available or suitable for Claimant. Therefore, Claimant's disability status did not abate as of March 25, 2002.

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curium) *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983).

The groin injury was work related and treated by Dr. Blake. As discussed above, Claimant's groin injury has been resolved, and according to Dr. Blake Claimant is not in need of any further medical assistance regarding the groin strain. However, he is entitled to all reasonable and necessary medical expenses associated with the treatment of that injury. Claimant's back and leg numbness were found to be unrelated to his January 24, 2002, accident on the job, and therefore, the MRI which was requested by Dr. Mosher is not Employer's responsibility.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent

and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 week of work was "substantially the whole year", where the work was characterized as "full time", "steady" and "regular") . The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Employer advocates the use of section 10(a), pointing out that Claimant had worked for Employer for substantially the whole year preceding the January 24, 2002 incident. However, the wage records fail to specify the actual number of days Claimant worked in the year preceding the accident, and therefore absent that integral element, section 10(a) calculations are not possible. Claimant argues that his hourly wage be multiplied by 40 to reach an average weekly wage of $600.00.

Neither 10(a) nor 10(b) is reasonable because there is insufficient evidence to properly use the calculations mandated by these sections. Without the number of days Claimant worked, nor the wages of comparably situated co-workers, it is imperative to calculate the average weekly wage under the auspices of 10(c).

Section (c) is a "catch-all" to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-

employment. Longshore and Harbor Workers' Compensation Act, §§ 10(c), 33 U.S.C.A. §§ 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997).

In the year preceding his injury, Claimant worked for Employer and earned a total of $16,929.54. In examining the wage records, I found that Claimant rarely worked forty hours a week, although both he and his supervisor testified that there was always work available (TR 63, 69). Therefore, if Claimant did not work it was because he chose to work fewer hours or because he was injured.[4] In spite of Claimant's argument that his average weekly wage be based on 40 hour weeks, I find that due to his wage earning history that would be an unreasonable earning potential for him. If Claimant had worked forty hour weeks for 52 weeks his annual earning would have been $31,200.00, almost twice what he actually earned in the preceding year.

Therefore, I find that Claimant's annual wage earning capacity is the best demonstrated by his actual wages of the year preceding the $16,929.54, which when divided by 52 weeks, the divider designated by 10(d), results in the average weekly wage of $325.57 and compensation payments of $217.04. However, since Claimant's average weekly compensation benefits would be less than half of the national average weekly wage as determined by the Secretary of Labor, I find that Claimant shall receive the minimum, $241.52 as determined by §6 (b) of the Act, as compensation for his temporary total disability.[5]

Section 14 (e) penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer did not pay compensation and did not controvert the claim until March 20, 2002. Therefore, § 14 (e) penalties are assessed against Employer.

ORDER

It is hereby ORDERED, ADJUDGED AND DECREED that:

[4] There exists no evidence that Claimant's absences were due to an industrial injury. Consequently, I infer Claimant simply elected to work fewer hours than were available to him.

[5] The national average weekly wage (NAWW) for January 2002 was $483.04, therefore, 50% of the NAWW would make the minimum compensation rate $241.52

(1) Employer shall pay to Claimant compensation for temporary total disability benefits from January 25, 2002 until May 31, 2002, the date of maximum medical improvement, based on an average weekly wage of $251.52;

(2) Employer shall pay or reimburse Claimant for all reasonable and necessary medical expenses, resulting from Claimant's groin injury of January 24, 2002;

(3) Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

(4) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(5) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 26th day of November, 2003, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:eam